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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORELYN PEÑERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE OF THE UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been lodged with the Clerk.

equality embodied in the Constitution and this Nation's civil rights laws. Through its Women's Rights Project, the ACLU has battled for more than twenty-five years against the legal perpetuation of outmoded gender stereotypes. Through its Immigrants' Rights Project, the ACLU has fought against discriminatory immigration policies. Because this case challenges a statute that facially discriminates on the basis of gender in the naturalization context, it raises issues of vital importance to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

NOW Legal Defense and Education Fund ("NOW LDEF") is one of the Nation's foremost nonprofit advocacy organizations dedicated to fighting sex discrimination through litigation, advocacy and public education. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, and has frequently appeared before this Court both as *amicus curiae* and direct counsel. A major goal of NOW LDEF is the elimination of sex-based generalizations and stereotypes, particularly those that concern the family roles of men and women.

STATEMENT OF THE CASE

Petitioner Lorelyn Miller was born in Angeles City, Republic of the Philippines, on June 20, 1970. Her mother is Luz Peñero, a Filipino national. Her father is Charlie R. Miller, an American citizen. Ms. Miller's parents were not married at the time of her birth and never subsequently married. Her birth certificate identifies Luz Peñero as her mother, but it does not list her father. No question exists concerning her paternity, however, because in July of 1992, shortly after her twenty-second birthday, a Texas court entered a Voluntary Paternity Decree establishing that Charlie R. Miller is indeed Ms. Miller's biological father.

Ms. Miller filed an application for registration and documentation with the U.S. State Department in November of 1991. The Department initially denied the application in February of 1992, and upheld the denial on further review in

November of 1992. The application was denied on the ground that Ms. Miller failed to meet the requirements of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1401 *et seq.*, which provides in Section 1409(a) that a foreign-born child with an American father and an alien mother will be deemed a U.S. citizen as of the date of birth if:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—
>
> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1994).[2] None of these requirements would have applied to Ms. Miller if her *mother* had been a U.S. citizen and her *father* an alien. In this situation, Ms. Miller would have automatically become a U.S. citizen at birth, provided her mother had been physically present in the United States or one of its possessions for a continuous period of one year. 8 U.S.C. § 1409(c).

Ms. Miller therefore filed suit in U.S. District Court, contending that Section 1409(a) violated the equal protection component of the Fifth Amendment's Due Process Clause. The District Court dismissed the suit on the ground that Ms.

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[2] Because she fell within a narrow statutory age bracket, Ms. Miller could have satisfied the requirement of Section 1409(a)(4) on a showing that she was legitimated prior to age 21, rather than 18, as provided under the section before it was amended in 1986. *See* 8 U.S.C. § 1409 *note* (1986 Amendments).

Miller lacked standing to challenge the statute. *Miller* v. *Christopher*, 870 F. Supp. 1 (D.D.C. 1994). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit held that the District Court erred in finding that Ms. Miller lacked standing. However, relying on this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), the Court of Appeals rejected her equal protection challenge on the ground that this Court's equal protection standards do not apply to Congress' exercise of its immigration powers. Instead, the Court of Appeals held that the gender-based immigration requirements need only be "facially legitimate" and here they are because "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13. This Court thereafter granted certiorari.

SUMMARY OF ARGUMENT

In *United States* v. *Virginia*, 116 S. Ct. 2264 (1996) ("*VMI*"), this Court reaffirmed in the strongest possible terms that "all gender-based classifications today" by every governmental unit must be subjected to "heightened scrutiny" under the Equal Protection Clause. The Court also reaffirmed that such classifications can pass muster under that scrutiny only if the government affirmatively advances an "exceedingly persuasive justification" for the classification. 116 S. Ct. at 2274-75, 2286.

This case involves the very kind of gender discrimination *VMI* was designed to eradicate: treating men and women differently based on overbroad, outdated stereotypes—here, the stereotype that women, but not men, have a natural connection to their children. Using that stereotype Congress passed a law automatically granting citizenship to illegitimate children of U.S. citizen mothers, but denying it to children of U.S. citizen fathers, unless the father first proves he is indeed the father and documents his commitment to care for the child. Such a statute should have been held to be a violation of equal protection under *VMI* given that the government has not and could not advance an "exceedingly persuasive justification" for it.

The statute was not invalidated, however, because the Court of Appeals thought that heightened scrutiny could not be applied to this gender stereotyping *at all* under this Court's 1977 decision in *Fiallo* v. *Bell*, *supra*. Under *Fiallo*, the court thought, equal protection challenges to an exercise of the sovereign immigration power could only be reviewed for facial legitimacy. And it found it was indeed legitimate because the court endorsed the antiquated sex stereotypes, saying: "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13.

For two reasons *Fiallo* does not control this case. First, this Court's jurisprudence since *Fiallo* makes clear that the government cannot avoid heightened scrutiny for acts of invidious discrimination merely because it is exercising fundamental sovereign powers affecting national security.

Second, even if there is something special about the *immigration* power over aliens that minimizes equal protection review, this case does not concern immigration. Instead, it concerns citizenship. The Court has never held that congressional action conferring citizenship is subject to anything less than the full protections of the Due Process and Equal Protection Clauses. Nor should it.

Finally, even if heightened scrutiny does not apply here and the stereotyping at issue need be nothing more than "facially legitimate," the stereotyping in this case is so gross and so completely without justification that it cannot be sustained even under that lesser test.

The proposition that women but not men care for children is an outdated relic. So too is the proposition that in certain areas Congress may engage in offensive stereotyping without being subject to the requirements of the Due Process or Equal Protection Clauses. The Court should put both relics to rest in this case.

ARGUMENT

I. SECTION 1409(a) IS PREMISED ON OVERBROAD AND OUTDATED GENDER STEREOTYPING

It is now beyond dispute that "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). Much of the justification for the sex discrimination that pervades the history of our Nation and its laws came from gender stereotyping, *i.e.*, assumptions about the proper roles, the proper spheres, the proper natures, of women and men. Such stereotyping was reflected in Justice Bradley's now infamous statement in his concurrence upholding Illinois' refusal to admit a woman to the practice of law: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

This brand of invidious categorization of people based on their gender has been thoroughly and repeatedly condemned by this Court. Yet it has risen again in the statute at issue, and it has been given new life by the decision of the Court of Appeals. The statute assumes that mothers, but not fathers, have a natural connection to their children; based on that assumption, it requires proof from fathers, but not mothers, of commitment and concern for their children before a father's child, but not a mother's, can become a citizen. The justification for the statute, offered by the Court of Appeals, could have been written by Justice Bradley himself: "[a] mother is far less likely to ignore the children she has carried in her womb than is the natural father." Pet. App. 13.

Inevitably, stereotypes often have some basis in fact. However, even a true generalization based on gender is suspect when it becomes a basis for apportioning legal benefits. *See, e.g.*, *Weinberger* v. *Weisenfeld*, 420 U.S. 636,

645 (1975) ("Obviously, while the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support * * * such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."). Instead, "fairness to individuals" dictates that such a generalization is "an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Los Angeles Dep't. of Water & Power* v. *Manhart*, 435 U.S. 702, 708-09 (1978) (construing Title VII of the Civil Rights Act of 1964).

The gender-based stereotype that underpins Section 1409(a) is not only suspect on its face—as just another version of Justice Bradley's discredited notion of separate spheres for men and women—but, as set out below, it is also untrue, as more and more men and women move beyond old norms of parenting and familial roles.

A. The Available Studies Show That Parenting Success Is Not A Function of Gender

It is now well-established that the gender of a parent does not determine whether that parent will have a close personal relationship with his or her children. *See* Graeme Russell & Norma Radin, *Increased Paternal Participation: The Father's Perspective*, in *Fatherhood and Family Policy* 156 (Michael E. Lamb & Abraham Sagi eds., 1983) (contrary to stereotype, studies show that fathers can be "just as sensitive and competent in care-giving as mothers"); William Marsiglio, *Fatherhood, Contemporary Theory, Research and Social Policy* 7 (William Marsiglio ed., 1995) (studies show that "although fathers typically interact with their children differently than do mothers, men are not inherently deficient in their ability to parent"); *see also* Pamela Daniels & Kathy Weingarten, *The Fatherhood Click: The Timing of Parenthood in Men's Lives*, in *Fatherhood Today: Men's Changing Role in the Family* 41 (Phyllis Bronstein & Carolyn Cowen eds., 1988) ("Fatherhood Today") (the ability

and desire to nurture a child is not inherent in either sex, but it must be learned and developed by both).

Indeed, the gender stereotype on which this statute is premised—that the American father is never anything more than the proverbial breadwinner who remains aloof from day-to-day child rearing duties—is plainly not valid today, even if it once was. *See* Rosalind C. Barnett & Grace K. Baruch, *Correlates of Fathers' Participation in Family Work*, in *Fatherhood Today* 66-67 (fathers are no longer confined to the role of providing financial support but rather are active participants in the socialization of the child).

In addition, gender stereotypes based on the notion of woman's role as the ideal mother connected by natural law to her children are clearly outdated and can lead to serious harms for women who deviate even slightly from this stereotype. In fact, the notion that the female parent, but not the male parent, has a natural and primary function of caring for the children and the home, so that no further proof of her connection to her children is necessary, is a thinly disguised version of the idea that woman's place is in the home and man's is in the marketplace. This dichotomy has been consistently harmful to women because it provides justification for gender-based classifications that limit women's opportunities and deny protection to their dependents. For example, women were barred from tending bar in Illinois because this conflicted with the legislature's notion of woman's place. *Goesaert* v. *Cleary*, 335 U.S. 464, 467 (1948). Similarly, women's dependents were given less protection in insurance systems like social security than were men's dependents based on the assumption that most women stayed home and cared for their children while most men worked outside the home. *See Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger*, *supra*; *Fronteiro*, *supra*.

The last three decades have seen women move beyond this stereotype from the role of the stay-home mother to that of working woman. The numbers tell the story. In 1960, 35.5% of the civilian employed population were women. In 1995, that percentage increased to 55.6. In 1960, approximately

39% of married women with children under 18 worked. In 1995, that figure was approximately 76%. Economics and Statistics Admin., Statistical Abstract of the United States 394, 400, U.S. Dept. of Commerce (1996). As a direct result of this movement of women into the workforce, fathers have become more active participants in childcare for reasons of both choice and necessity.

But women's re-entry into the work force is not, by any means, the only reason that fathers have assumed a greater share of domestic responsibilities. "[A]part from any response to the women's movement, men are also seeking increased emotional closeness with their infants as part of a men's movement toward fuller personhood, and as a reaction against the alienation and burnout of the purely instrumental role of family provider." Michael W. Yogman, James Cooley, and Daniel Kindlon, *Fathers, Infants, and Toddlers*, in *Fatherhood Today* 53. And contrary to any supposition that single-custodial fathers would be deficient in their ability to provide the emotional support once imputed solely to mothers, studies show that in fact fathers are able to provide children both emotional support and psychological nurturance. *See generally* Shirley M.H. Hanson, *Divorced Fathers with Custody*, in *Fatherhood Today* 166-194.

This established role of men as caring parents has not gone unnoticed in the popular culture. "Now the joys of fatherhood and shared parenting are touted in commercials, television programs, books, and magazine articles." *Id.* And, "[b]y the 1980s there were more fathers than mothers in television commercials, with more men than ever shown cuddling babies and pushing strollers." Scott Coltrane, *The Future of Fatherhood, Social, Demographic, and Economic Influences on Men's Family Involvement*, in *Fatherhood: Contemporary Theory, Research, and Social Policy* 255-256 (1995).

Indeed, it is now increasingly common that fathers, like mothers, stay home when their infant is sick, or go to a teacher conference, or take their 12-year-old to the orthodontist. *See* Phyllis Bronstein, *Marital and Parenting*

Roles in Transition: An Overview, in *Fatherhood Today* 3-4; *see also* Nancy K. S. Hochman, *Fathers Play Larger Roles in Custody*, N.Y. Times, April 20, 1997, Section 13LI, at 1 (more fathers are seeking shared time with their children and are engaged in joint decisionmaking on issues like religious affiliation, education and health concerns).

None of this is to say that men as a group are always exactly equal to women as a group in the quantity and quality of their parenting. Rather, it is to say that gender simply does not indicate whether a person will be a devoted parent. As this Court has repeatedly held, the issue is one in which people should be treated as *individuals*, not classified based on outdated, overbroad, gender stereotyping.

B. The Courts Have Confirmed that Gender Should Not Be Determinative of Parenting Performance

It is not only sociological data that belie the stereotype in this statute. The unfounded propositions that fathers are inherently less competent as parents and women are caregivers by nature has also been rejected by this Court and continues to be resoundingly rejected by courts and judicial task forces across the country.

For example, in *Califano* v. *Westcott*, this Court invalidated a statute that provided benefits to families whose dependent children were deprived of parental support because of the unemployment of the father, but denied such benefits if the mother became unemployed. It did so because a law "that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life" is part of the "baggage of sexual stereotypes." 443 U.S. 76, 89 (1979) (citation and internal quotation marks omitted). Similarly, in striking down a statute that automatically granted social security benefits to surviving widows with children but denied those benefits to the widower of a women who died in childbirth, making it difficult for him to stay at home with their surviving infant, this Court said: "It is no less important for a child to be cared

for by its sole surviving parent when that parent is male rather than female." *Weinberger*, 420 U.S. at 652.

In fact, for more than twenty-five years this Court has rejected statutes based on the very stereotype found in Section 1409 and upheld here by the Court of Appeals. *See, e.g.*, *Caban* v. *Mohammed*, 441 U.S. 380, 394 (1979) (striking statute which gave unwed mothers, but not unwed fathers, the power to unilaterally block an adoption, and criticizing the assumption that fathers are "invariably less qualified and entitled than mothers to exercise concerned judgment as to the fate of their children"); *Orr* v. *Orr*, 440 U.S. 268 (1979) (invalidating law that authorized state courts to impose alimony obligations only on men); *Reed* v. *Reed*, 404 U.S. 71 (1971) (invalidating statute that required males to be preferred to females as administrators of an estate and criticizing the assumption that men are more familiar with the business world).

Judicial task forces have likewise recognized that the stereotype on which Section 1409 is based—the image of the mother as connected by nature to her children while fathers are not—is harmful to both mothers and fathers in many areas, particularly in custody determinations. Paradoxically, the stereotype of women as natural caregivers of children can harm women seeking custody of their children in a divorce situation when those women do not conform to a judge's notion of the natural mother. Thus, women who do demanding work outside the home or who have an active social life may be disadvantaged in seeking custody where a man who did the same things would not be. For example, according to reports from Gender Bias Task Forces around the country, "stereotypes about 'fit mothers' subject women to heightened moral scrutiny in regard to parenting and personal behavior." Lynn Hecht Schafran, *Gender Bias in Family Courts*, 17 Family Advocate 22, 22-28 (1994). Similarly, stereotypes of women as the primary caregivers cause concern for the courts when a father seeks custody. In such cases, "mothers are held to a different and higher standard of parenting and personal behavior than fathers."

Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 Fla. L. Rev. 181, 192 (1990). For that reason, fathers are extremely successful when they contest custody. *See* The Report of the Gender Bias Study of the Massachusetts Supreme Judicial Court (1989) (finding that fathers who actively contest custody of the mother win in 70 percent of the cases).

At the same time women must struggle to overcome stereotypes associated with the "ideal mother," however, the honest desire of many fathers to assert their natural connection to their children belies the stereotype of the abandoning, illegitimate father. Today, "[t]here's no question that more fathers are asserting their rights to participate in their children's lives." Harriet Chiang, "Expanded Roles, Expanded Rights," *The San Francisco Chronicle*, August 23, 1995, at A1. Indeed, recent casebooks are full of decisions in which illegitimate fathers have turned to the courts for partial and full custodial rights with respect to their children, contradicting the notion that illegitimate fathers do not care for their children. *See, e.g., C.L.C.* v. *J.D.A.*, 690 So. 2d 365 (Ala. Civ. App. 1996) (father sought and was awarded custody, care, and control of child born out of wedlock), *cert. denied*, No. 1951715 (Ala. Mar. 21, 1997); *Bonilla* v. *Narvaez*, 642 N.Y.S. 2d 257 (N.Y. App. Div. 1996) (father of child born out of wedlock filed paternity petition and custody petition).

Again, these cases do not prove—and are not cited to show—that all illegitimate fathers have connections to their children. However, what all these data and cases make clear is that the stereotyping that underlies the statutory provision at issue here is false and grossly unfair and that the stereotyping is harmful to both men and women. The truth is that a person's gender does not dictate the level or quality of parental care or commitment. As next shown, this fact renders Section 1409(a) unacceptable under this Court's jurisprudence.

II. SECTION 1409(a) IS UNCONSTITUTIONAL UNDER ANY LEVEL OF SCRUTINY

Notwithstanding the blatant gender stereotyping imposed by Section 1409(a), the Court of Appeals failed to assess the provision's constitutionality under the equal protection component of the Fifth Amendment's Due Process Clause.[3] Instead, relying on this Court's opinion in *Fiallo*, the Court of Appeals held that even if the statute was "based on an overbroad and outdated stereotype," that fact "should be addressed to the Congress rather than the courts." Pet. App. 13 (quoting *Fiallo*, 430 U.S. at 799 n.9). Moreover, as already noted, even though the Court of Appeals recognized that under *Fiallo* the statute is at the very least subject to review for "facial legitimacy," the court held it legitimate by relying on the *very stereotype* underlying the statute itself: "A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence." *Id.*

For three reasons, it is submitted that the Court of Appeals erred. First, this Court's cases since *Fiallo* make clear that even when Congress exercises the kind of sovereign power presented here, that exercise must be consistent with Due Process and Equal Protection and must be subjected to heightened scrutiny to check racial and gender stereotyping. Second, unlike *Fiallo* this case concerns a citizenship statute, and is thus plainly subject to the full protections of the Due Process and Equal Protection Clauses. And third, even if this case were controlled by *Fiallo*'s minimal "facial legitimacy" standard rather than heightened scrutiny, the blatant stereotyping in the statute does not meet that lesser standard.

A. *Fiallo* Has Been Superseded

This Court's jurisprudence has changed since *Fiallo* was decided. Last Term in its *VMI* decision, the Court summar-

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[3] The requirements of the Fourteenth Amendment's Equal Protection Clause apply to the federal government through the Fifth Amendment's Due Process Clause. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

ized as follows "the core instruction" of its "pathmarking decisions" in *J.E.B.* v. *Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) and *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982): "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *VMI*, 116 S. Ct. at 2274. Both *VMI* and the "pathmarking decisions" it cited were handed down after *Fiallo*. And these cases make clear that the heightened scrutiny standard those cases described was made applicable without exception to *all* "gender-based government action." Indeed, the 1994 *JEB* decision could hardly have been more categorical: "[the] long and unfortunate history of sex discrimination" in this country "warrants the heightened scrutiny we afford *all* gender-based classifications today." 511 U.S. at 136 (emphasis supplied).

Nevertheless, the Court of Appeals read this Court's 1977 decision in *Fiallo* as precluding the application of heightened scrutiny to the obvious gender-based discrimination presented by the government action here. Indeed, that court thought that heightened scrutiny did not apply here at all. *Amici* respectfully disagree with that conclusion. In our view, a proper application of *VMI* mandates that the gender classification contained in this statute must be subject to heightened scrutiny, which it cannot survive.

This Court long ago made clear that despite its obligation to defer to Congress' judgment in certain areas, it is nonetheless duty bound to review those judgments when they are challenged as violative of the Constitution. "When it appears that an Act of Congress conflicts with [a constitutional] provision[ ], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop* v. *Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that a statute which stripped military personnel of American citizenship was unconstitutional).

Further, as already noted, however relaxed and selective this Court's approach to gender-based discrimination may

have been in 1977, after *Mississippi Univ. for Women*, *JEB* and *VMI* there can be no doubt that the Constitution does not tolerate such discrimination by *any* governmental unit under *any* circumstances, unless the government shows the requisite "exceedingly persuasive justification."

Moreover, whatever may have been the case in 1977 when *Fiallo* was decided, in *Landon* v. *Plasencia*, 459 U.S. 21 (1982) (decided the same year as *Mississippi Univ. for Women*) the Court put to rest any idea that the Due Process Clause is necessarily inapplicable to aliens seeking admission to this country. *Landon* made clear that even when the issue addressed by Congress is immigration of aliens, the Court must still make a judgment whether the alien seeking admission has shown sufficiently close ties to the country that her Due Process rights are triggered. In *Landon*, those ties were triggered by the fact that the alien was a lawful permanent resident. Here, those ties are established by the fact that petitioner is the child of a U.S. citizen, and by the further fact (as the Court of Appeals found) that she has an "ongoing parental relationship" with him. Pet. App. 13.

Finally, in insisting that heightened scrutiny did not apply to this exercise of Congress' important sovereign power over immigration, the Court of Appeals completely overlooked this Court's post-*Fiallo* decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). There this Court made clear that even though enormous deference is due to Congress' exercise of its sovereign power over national security and foreign affairs, such deference does *not* require complete abdication to Congress and it certainly does not trump the heightened scrutiny standards of the Equal Protection Clause.

In *Rostker*, the Court considered a challenge to a congressional statute requiring only men to register for the draft. A group of male plaintiffs sued, arguing that the statute violated equal protection under the Due Process Clause of the Fifth Amendment. In reviewing that argument, the Court first stressed that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded

Congress greater deference." *Id.* at 64-65. This, of course, is almost identical to the deferential description the Court in *Fiallo* gave to Congress' immigration power: "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792 (internal quotation marks and citations omitted).

This parallelism reflects the fact that the immigration and war powers are both fundamental attributes of national sovereignty. The exercise of either power by Congress has traditionally been afforded deference by the courts.[4] However, the exercise of neither power is sufficient to sweep away the rest of the Constitution. To the contrary, as *Rostker* explained, even though deference may be due because of the "context" of the "congressional choice," still:

> Congress is [not] free to disregard the Constitution when it acts in the area of military affairs. In that area, *as any other*, Congress remains subject to the limitations of the Due Process Clause * * * .

453 U.S. at 67 (emphasis added and internal citations omitted).

Significantly, though conceding that the Constitution's equal protection requirements applied in *Rostker*, the Solicitor General argued that rational review rather than the standard heightened scrutiny test should govern the gender-based distinctions there at issue. *See id.* at 69. But the Court *expressly rejected* this invitation: "We do not think that the substantive guarantee of due process or certainty in the law

[4] It is questionable, at best, whether the exercise of immigration powers should be afforded as much deference as the exercise of war powers. The assumption of equal deference ultimately rests on the xenophobic observation, most famously articulated in the discredited *Chinese Exclusion Case*, that our national security is threatened by "vast hordes of [a foreign] people crowding in upon us." 130 U.S. 581, 606 (1889). *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 Harv. L. Rev. 853, 862 (1987) (describing the *Chinese Exclusion* case as a "constitutional fossil").

will be advanced by any further 'refinement' in the applicable tests as suggested by the Government." *Id.* at 69.

Having refused to depart from traditional equal protection analysis, the Court analyzed the statute using intermediate scrutiny, while at the same time giving due deference to Congress' policy choices. In other words, quite unlike the reading the Court of Appeals gave to *Fiallo*, *Rostker* made plain that judicial deference to national sovereignty decisions does *not* obviate the need to apply heightened scrutiny to gender-based decision-making. Rather, deference requires a court to pay special respect to Congress' specialized judgments concerning the security matters at issue, but nevertheless to insist that those judgments are supported by evidence and meet the heightened scrutiny standards if they discriminate on the basis of gender. *Id.* at 69-72.

Applying that approach, the Court in *Rostker* found that the government had met its heightened burden by showing through "extensive testimony and evidence" that, quite unlike the "gender-based discrimination cases" where governments had acted "reflexively and not for any considered reason," in the case of the draft Congress had acted "realistically" on the basis of extensive information that "the sexes are not similarly situated." *Id.* at 72, 79.

This, of course, is not the approach taken by the Court of Appeals here. And, obviously, quite unlike the situation presented in *Rostker*, here there is no indication whatever that Congress *even addressed* the issue of gender discrimination, much less produced exceedingly persuasive evidence to justify it.

The Court of Appeals did not cite *Rostker*. Neither did it cite *Landon*, or *JEB*, or *Mississippi Univ. for Women*, or *VMI*. Instead, it simply relied on *Fiallo* for the proposition that immigration actions are immune from heightened scrutiny, no matter how blatant the gender-based stereotyping contained in that action. This Court should not condone this analysis, any more than it would have condoned it if the statute had said that children of black parents, but not of

white parents, must show that those parents were financially prepared to support them. It is unthinkable that such a statute would not have been subjected to heightened scrutiny. The same should be true here.[5] As Professor Aleinikoff has said:

> [Immigration law] is an ordinary, if powerful, constitutionally delegated prerogative. Accordingly, immigration regulations ought to be subject to the judicial scrutiny accorded other exercises of federal power * * *. There is no reason that immigration law cannot thrive within the constitutional boundaries established for other delegated and implied federal powers * * *. [I]mmigration law must be brought into the fold of modern constitutional law.

T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 866, 871 (1989).

For all these reasons, and contrary to the Court of Appeals' view, *Fiallo* does not control this case. This Court's jurisprudence today does not exempt the immigration power from the heightened scrutiny requirements of the Equal Protection Clause.

B. *Fiallo* Is In Any Case Distinguishable

As shown, exercises of the immigration power should not be *per se* exempt from heightened scrutiny. However, even if *Fiallo* required that they be exempt in some circumstances, *Fiallo* would not be controlling here because this case concerns not immigration but conferral of *citizenship*. This Court has never exempted citizenship determinations from ordinary equal protection analysis, much less said that heightened scrutiny would not apply if such determinations were based on race or gender stereotypes. Accordingly, even if some immigration policies remain beyond the reach of

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[5] As noted above, the proper disposition of this case does not depend on overruling *Fiallo*, which can be distinguished. However, to the extent that *Fiallo* was "badly reasoned" at the outset and no longer reflects this Court's constitutional jurisprudence, it should be overruled. *See Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991).

VMI, the Court should not allow citizenship to escape the requirements of that decision as well.

As the United States Court of Appeals for the Ninth Circuit has explained, citizenship statutes are fundamentally different from immigration statutes. *See Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1414 (9th Cir. 1993) ("Unlike the governmental decisions at issue in *Fiallo* and [*Kleindienst* v.*] Mandel*, [408 U.S. 753 (1972)] Section 1993 [conferring United States citizenship on foreign-born offspring of United States citizen fathers, but not mothers] represents not a congressional determination that various aliens should or should not be treated in a certain manner, but rather a decision as to who is a citizen in the first instance. This type of decision strikes us as *fundamentally different* from one considering individuals as to whose alienage there exists no dispute, such that we should perhaps utilize a more traditional (and hence more rigorous) standard of scrutiny in assessing it") (emphasis supplied).

Congress' citizenship decisions are "fundamentally different" from its immigration decisions because when regulating immigration, Congress exercises its authority to exclude persons with *no* present claim to citizenship. However, laws concerning citizenship apply to individuals who have an established connection to the United States, be it through time spent on American soil, military service, or family relationship to an American citizen. It is this tie to the United States that cloaks an individual with a claim to some degree of constitutional protection. *See, e.g., Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society").

Here, Congress has recognized that birth to an American citizen is a sufficiently strong tie to this country to make a child eligible for citizenship based on that tie alone. Because petitioner Miller has a congressionally recognized significant tie to this country—which would entitle her to all of citizenship's protections were it not for the type of gender-based

classification that this Court has repeatedly held unconstitutional in other contexts—she should be eligible to invoke the protections of the Constitution, including heightened scrutiny of the gender stereotype contained in the statute.

For these reasons, the Court of Appeals was wrong to follow *Fiallo*. And it was also wrong, therefore, to suppose that traditional Due Process/Equal Protection standards do not apply here.

C. The Statute Cannot Survive Heightened Scrutiny

Once it becomes clear that *Fiallo* does not control and that the requisite heightened scrutiny must be applied to this statute, it plainly cannot survive, even giving due deference to Congress' policy judgments.

As noted, in *VMI* this Court set forth the applicable framework for analyzing a gender-based equal protection challenge. The government must demonstrate an "exceedingly persuasive justification" in order to defend gender-based government action. 116 S. Ct. at 2274. Specifically, the government must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724) (internal quotation marks and citation omitted). However, "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi Univ. for Women*, 458 U.S. at 725 (citing *Frontiero*, 411 U.S. at 684-685). Similarly, the government's justification for the classification may not be based on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 116 S. Ct. at 2275.

Section 1409(a) provides that in order to obtain U.S. citizenship, an illegitimate child of a U.S. citizen father must prove both (1) a biological relationship with the father by clear and convincing evidence and (2) the existence, prior to

the child's eighteenth birthday, of a close personal relationship between them, as evidenced by the father's written agreement to provide the child with financial support until the child reaches age eighteen, and the father's voluntary acknowledgment of his paternity or a court adjudication confirming paternity. No such requirements must be met if the mother is the U.S. citizen.

The asserted important governmental objective for requiring that fathers, but not mothers, prove a biological connection by clear and convincing evidence under Section 1409 is to reduce fraudulent claims of citizenship. The asserted important governmental objective for requiring fathers, but not mothers, to prove a close personal relationship is to promote early ties to the United States and to relatives who are U.S. citizens. Pet. App. 13. *Amici* do not dispute that these are important objectives and acknowledge that deference is due them. But *amici* emphatically deny that the government's reliance on gender is substantially related to the achievement of those objectives. It is here that this statute plainly runs afoul of equal protection guarantees.

The Court of Appeals attempted to defend requiring fathers but not mothers to prove a biological connection by clear and convincing evidence under Section 1409 by referring to "the difficulties that once plagued the proof of paternity." Pet. App. 12. But as Judge Wald pointed out in her separate opinion, whatever justification there once may have been for distinguishing between men and women on this ground is now gone. Pet. App. 19. Indeed, as she noted, Congress itself has acknowledged that DNA testing has long since removed the claim that a father's biological connection is always inherently in doubt, while a mother's is not. As Congress has explained, "[r]ecent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent" of false paternity claims. Pet. App. 19 (Wald, J., concurring) (quoting H.R. Rep. No. 527, 98th Cong., 1st Sess. 38 (1983)). Thus, while the uncertainty of paternity may once have justified requiring fathers but not mothers to prove a blood relationship by clear and

convincing evidence, today it does not. Moreover, there is absolutely no basis for assuming that men are more likely than women to file fraudulent claims.

The statute's other gender-based distinction requires men but not women to demonstrate a commitment to the child (through legitimation and a financial pledge). Obviously, this cannot be substantially related to the purpose of granting citizenship only where there is a close tie with the child, unless it is assumed that mothers but not fathers will have such a tie. As noted, this Court requires an "exceedingly persuasive justification" for such an assumption. *VMI*, 116 S. Ct. at 2274. Yet here, neither the Congress nor the government produced any such justification. Nor could it. For as we have shown, the assumption is completely unfounded.

In sum, Section 1409(a)'s gender-based distinctions are not substantially related to achievement of its objective. Accordingly, just as the Court has done in numerous other cases of comparable stereotyping, the statute should be invalidated.[6]

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[6] *See, e.g., VMI, supra* (only men permitted to attend the Virginia Military Institute); *Mississippi Univ. for Women, supra* (only women permitted to attend state nursing school); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr, supra* (only men could be ordered to pay alimony following divorce); *Craig* v. *Boren*, 429 U.S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (women reached majority at an earlier age than did men); *Weinberger, supra* (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero, supra* (determination of spouse's dependency based upon gender of member of Armed Forces claiming dependency benefits); *Reed, supra* (statute preferred men to women as administrators of estates).

D. The Statute Cannot Meet Even The *Fiallo* "Facially Legitimate" Test

Even if this Court holds that "heightened" scrutiny is not applicable, Section 1409(a) nevertheless violates the Constitution. For the requirement that fathers, but not mothers, prove a biological connection, legitimate the child by age 18, and agree to provide financial support until the child reaches majority in order for that child to become a citizen, is not permissible even under the *Fiallo* test.

In *Fiallo*, the Court held that there is "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens * * * ." 430 U.S. at 793 n.5. This judicial responsibility, the Court said, is to uphold Congress' action only when there is "a facially legitimate" reason for it. *Id.* at 793-794. The reasons offered for Section 1409(a) do not satisfy this standard.

As noted, the reason offered for requiring that only fathers prove a biological relationship by clear and convincing evidence is the reduction of fraudulent claims. But as also noted, Congress has acknowledged that DNA testing has removed all doubt about the establishment of paternity. *See also Clark* v. *Jeter*, 486 U.S. 456, 465 (1988) (explaining that genetic testing techniques can now conclusively disprove over ninety-nine percent of false paternity claims). Because both mothers and fathers are easily able to prove a biological relationship, there is no facially legitimate reason for placing different burdens on fathers and mothers.

The reason offered for requiring only fathers to prove a close personal relationship—ensuring close family ties and personal commitment to the child—is likewise not facially legitimate. Rather, as shown, the presumption that mothers have close ties to their children and fathers do not is completely antiquated and demonstrably false.[7] Such blatant

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[7] Ironically, the ineffectiveness with which section 1409(a) regulates the existence of close family ties is demonstrated by the fact that the father in this case *did* have a close relationship with

stereotyping was repeatedly condemned by this Court *even before* heightened scrutiny was adopted.[8] It should be condemned again here no matter what standard the Court applies to it.

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his daughter, Pet. App. 13, yet she was denied citizenship under the statute. Similarly, in *Fiallo*, Justice Marshall noted in dissent that the father in that case had acknowledged paternity and had registered as the child's father soon after birth. 430 U.S. at 804. Even though this father took care of the child since birth, and notwithstanding that the mother abandoned the child and married another man, the father's petition to classify his son as his "child" for purposes of obtaining an immigration visa was denied. *See id.*

[8] For example, this Court held that a statute which extended the age of majority for boys three years beyond that for girls was unconstitutional under even the most deferential standard of review. *See Stanton, supra* (holding that there was "nothing rational in the distinction" between males and females); *see also Weinberger, supra* (holding that a statute granting survivor benefits to a widow with dependent children but not to a widower with dependent children is "entirely irrational"); *Reed, supra* (holding that a statute which gives preference to men when determining which of several equally qualified persons should serve as administrator of an estate is an "arbitrary legislative choice").

CONCLUSION

For the foregoing reasons, the Court should declare the statute unconstitutional and reverse the judgment below.

Respectfully submitted,

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